

No. 12,056

IN THE
United States Court of Appeals
For the Ninth Circuit

GEORGE W. BOULTER and MARGRETTA
L. BOULTER,

Appellants,

vs.

COMMERCIAL STANDARD INSURANCE
COMPANY, a corporation,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

PAUL C. DANA,
LEIGHTON M. BLEDSOE,
ROGERS P. SMITH,
R. S. CATHCART, and
DANA, BLEDSOE & SMITH,

440 Montgomery Street, San Francisco 4, California,

*Attorneys for Appellee
and Petitioner.*

R. S. CATHCART,

440 Montgomery Street, San Francisco 4, California,

Of Counsel.

FILED

JUL 27 1949

Subject Index

	Page
Argument	3
I. The assumption of the fact (made by this court) that Warner was "merely cruising in search of loads" at the time the accident happened is contrary to the uncontradicted and unimpeached evidence in the record..	3
II. The suggestion in the opinion that the use to which the vehicle was being put at the time of the accident was a use covered by the insurance policy in question is contrary to law	11
III. This court, if it adheres to the conclusion (expressed in its opinion) that there was evidence that, at the time of the accident, Warner was "merely cruising in search of loads", erred in failing to remand the controversy to the trial court with directions to reconsider appellee's alternative motion for new trial in the light of such evidence (which this court now holds existed, but the existence of which we deny), since the trial court (by ignoring the possible existence of such evidence) failed in its duty to exercise discretion in passing on the weight and sufficiency of any such evidence.....	13
IV. Conclusion	17

Table of Authorities Cited

Cases	Pages
Alexander v. Standard Accident Insurance Company, C.C.A. 10 (1941), 122 Fed. (2d) 995	10
Coakley v. Ajuria (1930), 209 Cal. 745, 290 Pac. 33.....	14
Connelly v. U. S., C.C.A. 5 (1941), 123 Fed. (2d) 1.....	10
Galloway v. U. S. (1943), 319 U. S. 372	10
Smith v. Calif. Highway Indem. Exchange, 218 Cal. 325, 23 Pac. (2d) 274	5
Southern Pacific Co. v. Klinge, C.C.A. 10 (1933), 65 Fed. (2d) 85	13, 16

Texts

11 Cyclopedia of Federal Procedure (2nd Edition) Section 6036	13
--	----

No. 12,056

IN THE

**United States Court of Appeals
For the Ninth Circuit**

GEORGE W. BOULTER and MARGRETTA
L. BOULTER,
vs.

Appellants,

COMMERCIAL STANDARD INSURANCE
COMPANY, a corporation,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

*To the Honorable William Denman, Presiding Judge,
and to the Honorable Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

Appellee herewith petitions this Honorable Court to grant a rehearing in the above-entitled matter to the end that errors which appear in the Opinion may be corrected and the judgment of the trial Court reinstated, or, in the alternative, the controversy be remanded to the trial Court with instructions to reconsider Appellee's Motion for New Trial in the light of all the evidence.

The grounds upon which Appellee requests such rehearing are as follows:

I. The assumption of the fact (made by this Court) that Warner was “merely cruising in search of loads” at the time the accident happened is contrary to the uncontradicted and unimpeached evidence in the record.

II. The suggestion in the Opinion that the use to which the vehicle was being put at the time of the accident was a use covered by the insurance policy in question is contrary to law.

III. This Court, if it adheres to the conclusion (expressed in its Opinion) that there was evidence that, at the time of the accident, Warner was “merely cruising in search of loads”, erred in failing to remand the controversy to the trial Court with directions to reconsider Appellee’s alternative Motion for New Trial in the light of such evidence (which this Court now holds existed, but the existence of which we deny), since the trial Court (by ignoring the possible existence of such evidence) failed in its duty to exercise discretion in passing on the weight and sufficiency of any such evidence.

ARGUMENT.

I. THE ASSUMPTION OF THE FACT (MADE BY THIS COURT) THAT WARNER WAS "MERELY CRUISING IN SEARCH OF LOADS" AT THE TIME THE ACCIDENT HAPPENED IS CONTRARY TO THE UNCONTRADICTED AND UNIMPEACHED EVIDENCE IN THE RECORD.

It is respectfully submitted that in the opinion of this Court, published June 27, 1949, by which judgment in favor of the Appellee was reversed and judgment ordered entered in favor of Appellants, this Court has made assumptions of fact which are flatly contrary to the uncontradicted and unimpeached evidence which was before the jury and the trial judge when he directed a verdict in favor of Appellee.

The opinion of this Court, as we read it, is based on the assumption that, at the time the accident happened, Warner, the assured, was southbound from Eureka to San Francisco, with the dual purpose of (i) paying a premium on his insurance policy and (ii) then proceeding on to San Jose with the intention of soliciting Dowdell for a hauling job *to be performed at that time and before the assured returned to the Eureka area for his trailer, i.e. that he was "merely cruising in search of loads."*

This assumption, we submit, is erroneous, because the evidence lends itself to no other conclusion than that at the time of the accident Warner was bound for San Francisco *with the unqualified intention of returning to Eureka before engaging in any hauling operations for Dowdell, or anyone else.*

The most that can be said for Warner's intentions with respect to Dowdell is (we submit) that he intended merely to get in touch with Dowdell concerning the possibility of a future hauling job, but there is no evidence whatsoever that Warner intended to haul for Dowdell or anyone else before returning to Eureka to pick up his trailer. The evidence, indeed, is to the contrary.

It is the position of this Court (as we read the opinion) that, at the moment of the accident, Warner was a wildcat operator "merely cruising in search of loads", or "in anticipation of procuring a load", and that any intention he had with respect to the payment of a premium on his insurance policy merely made his trip a "dual purpose" trip which combined operations covered by the policy with operations not covered by the policy.

We can see no basis on which this Court can ignore the uncontradicted testimony which Warner gave in the State Court action, and which was before the jury in this case, and before Judge Yankwich when he directed a verdict in favor of the Appellee. This testimony reads (in part) as follows (Tr. 153):

"Q. At the time of this accident, you were returning to San Francisco?

A. That's right.

Q. You were returning back to continue with your business?

A. No, I had a definite purpose in coming down, I might state. I had a payment due on my insurance policy Monday. My policy would

lapse if I did not get in here Monday. That was the reason for coming down [to] Frisco, here.

Q. So you came down for that business?

A. That's right.

Q. *And when did you intend to return for your tractor?*

A. *The following day.*

Q. *For your trailer?*

A. *The following day."*

(Counsel had inadvertently said "tractor" when he meant "trailer". See Tr. 153.)

In the numerous cases cited by us (Appellee's Brief pp. 13-21) and referred to by this Court in its opinion (Footnote No. 3) the assured had, prior to or immediately subsequent to the accident in question, been engaged in operations which were clearly covered by the policy, but in none of the cases was the general intent to engage in an operation covered by the policy considered any basis for extending coverage to a specific operation where the intent was demonstrably otherwise and the operation, therefore, not covered by the policy. *Smith v. Calif. Highway Indem. Exchange*, 218 Cal.325; 23 Pac.(2d) 274 (referred to in the Opinion), presents no different rule: in that case the Court held that the assured was actually engaged in an operation "incidental" to his taxi-cab business when the accident happened.

There is no evidence, we respectfully submit, on which this Court can predicate its conclusion that, at the time of the accident, Warner intended to continue

on from San Francisco to San Jose for the purpose of soliciting and *then and there* engaging in carrying merchandise before returning to Eureka to pick up his trailer, *even if the opportunity had arisen*.

Warner testified that it had been his intention to carry a load from Eureka back to San Francisco (Tr. 107); and there is no evidence that he ever departed from this intention, which he in fact carried out.

He was interrogated respecting his intention in making the trip on which the accident occurred. He testified (Tr. 110-111):

“Q. Now what was your purpose in going to San Francisco?

A. There was an installment due on the policy, this policy. It was due on a Monday morning, or it was due, anyway—I forget how many hours I had grace, but that was my reason for coming to San Francisco as I did, without the trailer.

Q. And did you arrive in San Francisco?

A. I did.

Q. Did you make the run from Eureka to San Francisco without the trailer?

A. I did.

Q. And did this accident happen on that run?

A. Yes.”

He further testified (Tr. 114-115):

“Q. Now this accident happened on your way to San Francisco, is that correct?

A. That’s right.

Q. And after the accident you continued on to San Francisco, is that correct?

A. That’s correct.

Q. And how many days did you stay in San Francisco?

A. I was in until, I went down to the insurance company and notified the insurance company on Monday morning of the accident, and I paid my premium. That was on a Monday morning. Tuesday morning—Wednesday morning I left for Eureka, back up again. I had had the truck repaired Monday, the tractor rather, here in town. I went back up again to get my trailer.”

He was then interrogated by the Court respecting his *subsequent* return to San Francisco, after he had returned to Eureka and picked up his trailer, in accordance with his avowed intention. He testified (Tr. 115-116):

“A. Then I came back to San Francisco.

The Court. Q. Well did you pick up your trailer? And [were] the pipes then unloaded from your trailer?

A. Everything had been unloaded. I had a haul at the time with John Dowdell, of San Jose. That is John Dowdell, Draymen; I believe we were hauling concrete pipe out of San Jose for housing projects all over the area, the peninsula area. That was one of the——

Q. Well the point is this; you came back empty?

A. Yes.

Q. You just went back to get the trailer?

A. No, I got my trailer, and——

Q. By the way, when you came back the first time, when you came to San Francisco, was your wife with you?

A. My wife was with me.

Q. When did she come back—was she with you at the time of the accident?

A. She was with me at the time of the accident.

Q. Well did you leave her behind when you went back again?

A. Yes I did.

Q. You went back alone?

A. Yes.

Q. And you went back to get the trailer?

A. That's right.

Q. And the only reason you came back to San Francisco instead of waiting until the pipe was unloaded was because you wanted to return back and pay this premium?

A. To pay my premium, yes sir.

Q. I see."

Warner's proposed activities for Dowdell in the San Jose area were (as the testimony just quoted discloses) manifestly connected with a point in time which occurred *after* he had returned to Eureka to pick up his trailer. Thus, in speaking of his eventual return to San Francisco after he had picked up his trailer, he stated (Tr. 120-121):

"Q. Then when did you come back again?

A. Thursday morning.

Q. The very next Thursday morning or a week later?

A. No, that same Thursday morning.

Q. I see. And was your trailer loaded as you made that trip south?

A. Well I had a big range and some other stuff coming back home.

Q. Who owned that range?

A. It belonged to my sister too. I got \$64 bringing it back.

Q. And where did you deliver that?

A. I delivered that, to, I believe, my mother's place, at Number 10 Ord Court.

Q. *I see. Then was it after that that this San Jose contract came up that you were telling us about?*

A. *That's right, the following morning, I believe that was a Friday morning. I left for Carmel.*

Q. *Yes. I see. Now did you get that contract after you got back to San Francisco?*

A. *I did."*

Even under prompting by counsel for the Appellants Warner at no time claimed that it was his intention, if Dowdell offered him a hauling job, to haul for Dowdell (or anyone else) before returning to Eureka. He merely said that it was his intention "to talk to him [Dowdell] about hauling merchandise" (Tr. 128) and "to discuss with someone in San Jose the hauling of a load" (Tr. 127). Indeed, from all that appears in the record, he might have intended to talk to Dowdell or someone else about some hauling job in the past.

In an effort to make it appear that Warner had hoped or intended immediately to haul for Dowdell before again returning to the Eureka area, counsel for the Appellants (Tr. 140) asked Warner if the fact

that his vehicle was tied up for repairs in San Francisco was the reason "why you did not communicate with Dowdell". Even under this prompting Warner did not claim that he had intended at that time and before returning to Eureka to engage in a haul for Dowdell even if one were offered. He merely answered, "Well, I guess that would be as good a reason as any".

Warner did not claim that that was *his* reason and his "guess" can hardly be made the basis (we submit) for overturning the ruling of the trial Court directing a verdict for the Appellee. See *Galloway v. U. S.* (1943), 319 U.S. 372; *Connelly v. U. S.*, C.C.A. 5 (1941), 123 Fed. (2d) 1, and *Alexander v. Standard Accident Insurance Company*, C.C.A. 10 (1941), 122 Fed. (2d) 995, from which we quote at pages 24 and 25 of our brief, and in which the Courts sustained judgments on directed verdicts with the statement (in effect) that such judgments would not be overturned for "mere speculation", or where the record presented a "mere choice of probabilities".

Quite apart from that, Warner's "guess" merely referred to his plan to "communicate" with Dowdell; it did not refer to an intention to haul before returning to Eureka.

It is true, of course, that Dowdell *might* have had work for Warner had Warner solicited him when he arrived in San Francisco. However, again, there is no evidence whatsoever that Warner intended to accept such work. Indeed, as we have shown, the only

evidence is to the contrary, and even though the accident had not happened, we submit that the record lends itself to no other construction than that Warner intended to return to Eureka and get his trailer before engaging in any further hauling operations for Dowdell or anyone else.

That Warner's intentions with respect to performing any hauling job he might obtain from Dowdell were directed to a point in time which would occur *after* he had returned to Eureka, picked up his trailer, and again returned to the San Francisco area, is also clear from the following testimony (Tr. 166):

“Q. And you intended, after bringing your tractor and the trailer back to San Francisco, to go to San Jose and see if Mr. Dowdell had some hauling you could do for him, is that right?

A. Yes.”

II. THE SUGGESTION IN THE OPINION THAT THE USE TO WHICH THE VEHICLE WAS BEING PUT AT THE TIME OF THE ACCIDENT WAS A USE COVERED BY THE INSURANCE POLICY IN QUESTION IS CONTRARY TO LAW.

We note that this Court states in its opinion that “even if the errand to pay the premium was an excluded use, which we are not prepared to say, the only consequence would be that Warner combined a purpose to procure hauling with a purpose to pay a ‘bill’”, and that if the trip is to be construed as “a multiple purpose trip, in part for non-transportation purposes”, coverage extended at the time of the accident.

If this Court is of the opinion that Warner was using the vehicle in this instance for driving from

Eureka to San Francisco for the sole purpose of paying the premium on an insurance policy and that that was a covered use, we submit that the opinion runs counter to established law as evidenced in the numerous cases above referred to (Opinion, footnote No. 3 and Appellee's Brief pp. 13-21). An added intention (if it existed) to communicate with Dowdell about hauling operations to take place *after Warner had returned to Eureka, picked up his trailer, and once again headed south* involves a mere *general commercial use* of the vehicle, and is not a necessary incident of the business of transportation of merchandise, as the same cases indicate, and is, accordingly, a non-covered use.

Liability insurance coverage for general commercial purposes was available and Warner could have purchased it had he so desired. He undertook to use his vehicle for general commercial purposes without procuring and paying for such coverage and he was using his vehicle for such non-covered purposes at the time the accident happened.

This Court has, in its opinion, given Warner the benefit of a bargain he did not make, and, by the same token, has given the Appellants the benefit of a bargain which was not made.

That Appellee's policy contained no restriction on the "manner in which the 'transportation of merchandise' business is to be conducted" (as this Court pointed out in the opinion) does not, we submit, permit the conclusion that a "wildcat operator", every time he drives his vehicle on the highway, is engaged

in the "transportation of merchandise" or in an activity "for which authorization is required" by the California Highway Carrier Act when, as to the specific occasion involved, the evidence is that he was engaging in an operation which involved a mere commercial use of the vehicle only remotely connected with the "covered" use.

That a purely "incidental" use of a vehicle must be far more immediate to a covered use than the use here involved, in order to avail the user of the benefits of a policy by its terms limited to a specific use, is established, we submit, by the cases referred to in our brief (Appellee's Br. pp. 13-21) and the Opinion of this Court (Footnote 3).

III. THIS COURT, IF IT ADHERES TO THE CONCLUSION (EXPRESSED IN ITS OPINION) THAT THERE WAS EVIDENCE THAT, AT THE TIME OF THE ACCIDENT, WARNER WAS "MERELY CRUISING IN SEARCH OF LOADS", ERRED IN FAILING TO REMAND THE CONTROVERSY TO THE TRIAL COURT WITH DIRECTIONS TO RECONSIDER APPELLEE'S ALTERNATIVE MOTION FOR NEW TRIAL IN THE LIGHT OF SUCH EVIDENCE (WHICH THIS COURT NOW HOLDS EXISTED, BUT THE EXISTENCE OF WHICH WE DENY), SINCE THE TRIAL COURT (BY IGNORING THE POSSIBLE EXISTENCE OF SUCH EVIDENCE) FAILED IN ITS DUTY TO EXERCISE DISCRETION IN PASSING ON THE WEIGHT AND SUFFICIENCY OF ANY SUCH EVIDENCE.

It is well established that the refusal of a trial Court to exercise discretion in passing upon the weight and sufficiency of the evidence on a Motion for a New Trial is reversible error. *Southern Pacific Co. v. Klinge*, C.C.A. 10 (1933), 65 Fed. (2d) 85; 11 Cyclo-

pedia of Federal Procedure (2nd Edition) section 6036.

It was obviously the duty of the trial judge, in passing on our alternative Motion for a New Trial, to consider *all* of the evidence before him. If he, sitting as a "13th juror", felt that the evidence was not satisfactory, it was his duty, of course, to grant a new trial in accordance with our Motion, and in arriving at a determination as to the weight and sufficiency of the evidence it was his duty to consider *all* of the evidence.

It is patent from Judge Yankwich's Opinion* that he adhered to the view that the evidence showed only that, at the time the accident happened, Warner was bound for San Francisco with the intention of (i) paying a premium on his insurance policy and (ii) the unresolved intention of soliciting business from Dowdell. There is no suggestion in the Opinion that Judge Yankwich held the view that Warner was "merely cruising in search of loads" or that he intended to haul for Dowdell before completing the "non-covered" use and returning to Eureka to pick up his trailer

*Whether the trial court exercised any discretion in passing on the weight and sufficiency of the evidence on our Motion for New Trial may, of course, be ascertained from its Opinion. *Coakley v. Ajuria* (1930), 209 Cal. 745 at 749, 290 Pac. 33:

"We think the learned trial judge took an erroneous view of the law applicable to the facts, as is made apparent from an oral opinion which he delivered * * * While the reasons of a trial court so given do not in a strict sense constitute a part of the record on appeal, yet where they furnish, as in this case, the basis of the court's action, and really constitute the only grounds upon which the judgment may be affirmed, it is proper to give them special consideration. * * *" (209 Cal. 745 at 749.)

even had his (claimed) intent to solicit from Dowdell resulted in a hauling operation.

Judge Yankwich, in short, wholly failed to consider the weight and sufficiency of evidence (which this Court now holds existed) from which (as this Court feels) it could have been determined that Warner was “merely cruising in search of loads”. If the evidence on this point had not been satisfactory to Judge Yankwich, he might well, in the exercise of his discretion, have granted a new trial. In any event, we were entitled to have him exercise his discretion and pass upon the weight and sufficiency of such evidence, and it is clear from his opinion that he did not do so, since he patently did not feel that any such evidence existed.

By way of illustration we restate this principle as follows:

In passing upon our Motion for New Trial, Judge Yankwich assumed, from the evidence, the existence of only facts A and B; he held that, *as a matter of law*, the existence of facts A and B would not sustain the verdict of the jury. Accordingly, he granted judgment notwithstanding the verdict, but stated (in effect) that if he was wrong on the point of law, and that if facts A and B *were* sufficient to sustain the verdict, there was no occasion for granting a new trial, as the evidence was legally sufficient to establish the existence of facts A and B.

He did not consider whether there was any evidence of fact C, (“merely cruising in search of loads”), and,

accordingly, did not exercise his duty of sitting as a "13th juror" in passing on the weight and sufficiency of any evidence claimed to support the existence of fact C.

Again, this Court has now held (as we read the Opinion) that there was evidence of fact C. Judge Yankwich (as his Opinion demonstrates) exercised no discretion in passing upon the weight and sufficiency of the evidence in support of fact C, because he never considered its existence or non-existence. We were entitled to have him exercise discretion in passing on that point, and his failure to do so was reversible error under the rule of *Southern Pacific Co. v. Klinge*, supra.

We are not unmindful of the rule that new points will not "ordinarily" be considered for the first time on a petition for rehearing. However, in this instance we appeal to the discretionary powers of this Court over its own procedure in view of the fact that this Court's Opinion contains the first suggestion in this litigation, by either Court or counsel, that Warner was "merely cruising in search of loads" at the time the accident happened.

In these circumstances we respectfully request that this Court, if it declines to reinstate Judge Yankwich's Order granting judgment notwithstanding the verdict, remand the controversy to Judge Yankwich with directions to exercise discretion in passing upon the weight and sufficiency of the evidence on our motion for new trial in the light of the existence of *all* the evidence which this Court now holds is contained in the record.

Stated another way, Judge Yankwich should be required to pass upon the weight and sufficiency of any evidence claimed to support the factual assumption of this Court that Warner was merely "cruising in search of loads" at the time of the accident.

IV. CONCLUSION.

It is respectfully submitted that a rehearing should be granted to the end that the judgment of the trial Court be reinstated or, in the alternative, that the controversy be remanded to the trial Court with directions to reconsider our motion for new trial in the light of all the evidence.

Dated, San Francisco, California,

July 27, 1949.

Respectfully submitted,

PAUL C. DANA,

LEIGHTON M. BLEDSOE,

ROGERS P. SMITH,

R. S. CATHCART, and

DANA, BLEDSOE & SMITH,

*Attorneys for Appellee
and Petitioner.*

R. S. CATHCART,

Of Counsel.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
July 27, 1949.

R. S. CATHCART,
*Of Counsel for Appellee
and Petitioner.*

